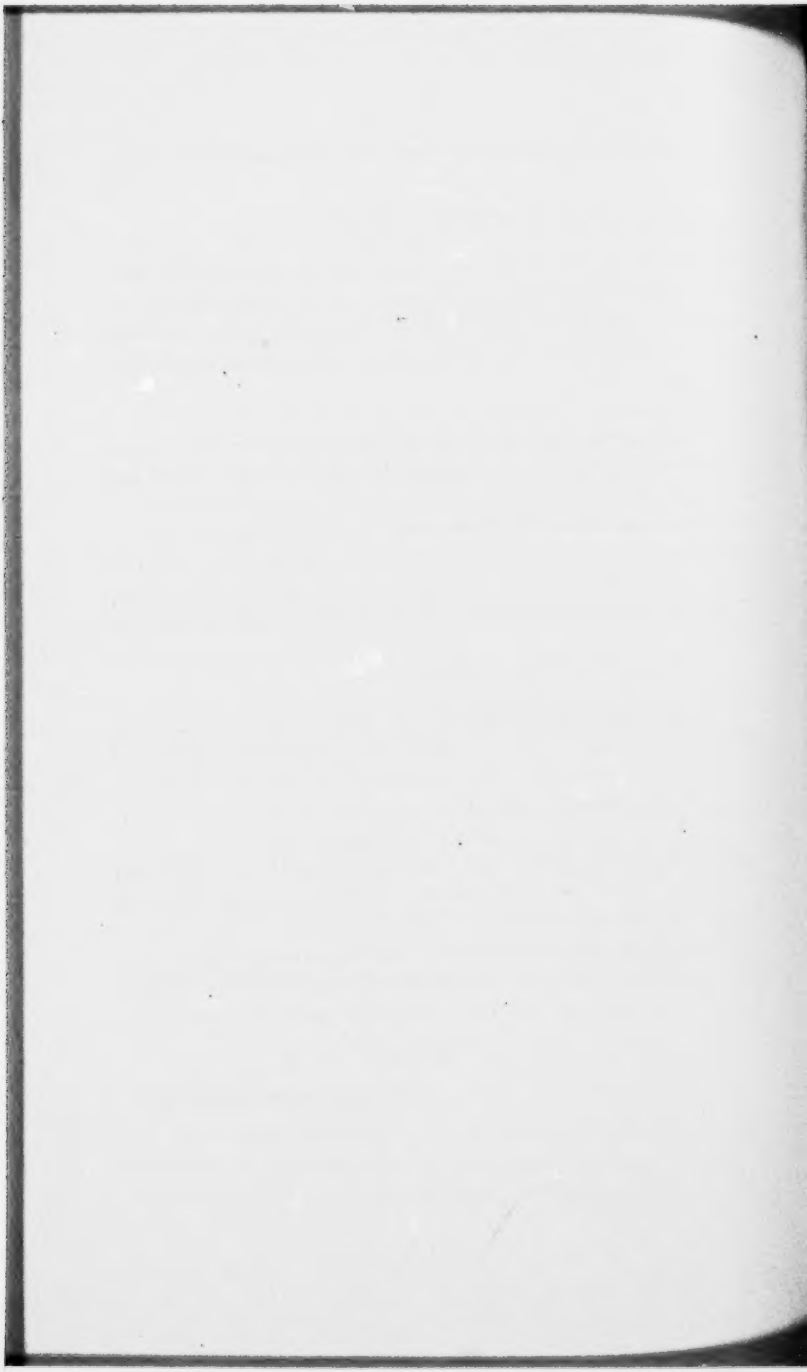

No. 625

Supreme Court of the United States

October Term 1898.

Brief of Kneeland for

GEORGE W. CROSSMAN, *et al.*,

Respondents and Petitioners,

Filed Jan. 16, 1899.

versus

WILLIAM BURRILL, *et al.*,

Libellants.

Brief for Libellants in opposition to Petition for Writ of Certiorari.

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Supreme Court of the United States

GEORGE W. CROSSMAN and HERMAN SIELCKEN,
Respondents and Petitioners,

vs.

WILLIAM BURRILL *et al.*, Owners of the Bark "Kate Burrill,"
Libellants.

Brief for Libellants in Opposition to Petition for Writ of Certiorari.

The Circuit Court of Appeals for the Second Circuit has directed the District Court to decree in favor of libellants for fifty-three days demurrage, at the charter rate of $59.46 per day, amounting to $3,151.

The facts, concerning which there is no dispute, are as follows:

In March, 1893, the libellants, owners of the bark *Kate Burrill*, chartered that vessel to the respondents by written charter-party, to carry a full cargo of pitch pine lumber from Pensacola to Rio de Janeiro, at an agreed rate of freight.

The charter-party contained the following provisions:

(1) "The cargo to be furnished at port of loading "at the average rate of not less than 20,000 super-

"ficial feet per running day, Sundays excepted, "and to be discharged at port of destination at "the average rate of not less than 20,000 superficial "feet per running day, Sundays excepted. Lay "days to commence from the time the vessel is "ready to receive or discharge cargo, and written "notice thereof is given to the party of the second "part (respondent) or agent; and for each and "every day's detention by default of the said party "of the second part, or agent, $59.46 in U. S. gold "(or its equivalent), per day, day by day, shall be "paid by said party of the second part, or agent, "to the said party of the first part, or agent."

(2) "Vessel to discharge at safe anchorage ground "in Rio Bay, designated by charterers."

(3) "The bills of lading to be signed as presented "without prejudice to this charter."

(4) "Vessel to have an absolute lien upon the cargo "for all freight, dead freight and demurrage. "Charterers' responsibility to cease when the vessel "is loaded and bills of lading are signed."

(5) "The vessel to be consigned to charterers' "agents at port of discharge, inwards only, paying "them a consignment commission," etc.

The bill of lading presented by the charterers to the master and signed by him shows the shipment by the charterers "to be delivered * * * at the "aforesaid port of Rio de Janeiro unto order or "their assigns, *they paying freight for the said "lumber as per charter party.*"

The bills of lading were assigned by the respondents to Companhia Industrial do Brazil, who were also the respondents' agents, to whom the vessel was consigned under the charter-party, and the bills of lading were assigned by the latter to Manoel da Cruz y Filho, purchasers of the lumber.

The vessel arrived at Rio on August 30, 1893,

where she delivered 514,256 feet of lumber. On September 4th, 1893, written notice that the vessel was ready to discharge her cargo was given by the master to the respondents' agents, who thereupon designated an anchorage, and on the following day, September 5th, the vessel hauled to said anchorage, and on the 6th September commenced the discharge of her cargo. The lay days for discharging at the rate of 20,000 superficial feet per day, excepting Sundays, expired on October 6th, but the vessel was detained until November 28th, a further period of 53 days, for which time the libellants have been awarded demurrage at the charter rate.

After completion of the discharge, the respondents' agents made up a written statement of the freight due the vessel under the charter-party, and presented the same to the libellants' agents and paid to the latter the balance shown to be due by such statement. The balance shown due by this statement and paid to the respondents' agents was the exact amount due for freight under the charter-party less disbursements and a prior payment on account.

The respondents set up as defences:

1. The "cesser clause" contained in the charter-party—"Charterer's responsibility to cease when the vessel is loaded and bills of lading signed."

2. That the libellants were prevented from discharging the cargo and respondents were prevented from receiving same sooner than they did, by reason of acts of the public enemy, namely, the state of hostilities existing at Rio by reason of the pending revolution.

3. That the payment to and receipt by the libellant's agents of the balance due for freight under charter-party was accepted and received in full satisfaction of all claims and demands under the charter party.

Exceptions to these defences, as insufficient in law, were filed in the District Court and the case was heard upon such exceptions. The District Court sustained the exception to the defence of the "cesser clause" in the charter party, but overruled the exception to the second defence upon the ground that the libel did not allege the actual readiness of the vessel to discharge, but only that notice of such readiness was given. Application to amend the libel was denied and a decree dismissing the libel entered, from which appeal was taken by libellants to the Circuit Court of Appeals.

Amendment to the libel was permitted by that Court and the libel was accordingly amended, alleging actual readiness on the part of the vessel to discharge and that the discharge was actually commenced on the 6th day of September, 1893. The same defences were interposed in the answer to the amended libel and exceptions to the sufficiency of the same again filed. The Circuit Court of Appeals sustained the exceptions to both the first and second defences, and testimony was then taken concerning the circumstances connected with the payment of the balance of the freight to the agents of the libellants at Rio. Upon final hearing the Circuit Court of Appeals determined that the defence of account stated and accord and satisfaction of all claims under the charter party was not sustained.

The libellants call attention to the following considerations:

FIRST.—The petition of the respondents does not assert or claim, nor do the facts recited therein show that this case is one "of peculiar gravity or general importance," or that the exercise of the jurisdiction of this Court is necessary "to secure uniformity of decision."

American Construction Co. v. *Jacksonville Railway*, 148 U. S., 372, 383.

SECOND.—Both the District Court and the Circuit Court of Appeals have concurred in the finding that the "cesser clause," contained in the charter party, did not relieve the respondents from liability, in view of the fact that they required the master to sign bills of lading, which did not bind the consignee of the cargo to *pay demurrage as per charter party.* Such finding is in conformity with the decisions of the courts of this country and England, as appears from the authorities cited in the opinions, to which may be added the recent decision of the Circuit Court of Appeals for the Fifth Circuit in *Schmidt* v. *Keyser*, 88 F. R., 799.

THIRD.—There is no real conflict between the opinions of the District Court and the Circuit Court of Appeals upon the sufficiency of the defence pleaded, that the delay in discharging the cargo was due to the act of the public enemy. The only exceptions contained in the charter party are "dangers of the seas, fires and navigation."

The decision of the learned District Judge was based upon the fact that the original libel did not allege actual readiness on the part of the vessel or the designation of a safe anchorage. This omission was remedied by amendment. The amended libel alleged not only readiness on the part of the vessel and the designation of a safe anchorage by respondents' agent, but also the actual commencement of the discharge of the cargo, all of which allegations were fully established by the evidence.

The time for discharge of the cargo was fixed by the charter party, and the authorities are unanimous in holding, that, in such cases, the charterer takes the risk of all unforseen circumstances. In addition to the authorities cited by Judge Wallace in his opinion we call attention to the later decision of the Circuit Court of Appeals for the Eighth Circuit in *Empire Transportation Co.* v. *Philadelphia & R. Coal & Iron Co.*, 77 F. R., 919.

FOURTH.—The question of the effect of the payment made to the libellants' agent at Rio is fully disposed of by the opinion of the Circuit Court of Appeals on the final hearing.

FIFTH.—The questions involved are more elaborately considered in the briefs of the libellants' counsel in the Circuit Court of Appeals hereto appended.

It is respectfully submitted that the petition of the respondents should be denied.

January, 1899.

LAWRENCE KNEELAND,
Advocate for Libellants.

U. S. Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

WILLIAM BURRILL *et al.*

vs.

GEORGE W. CROSSMAN *et al.*

BRIEF FOR LIBELLANTS ON EXCEPTIONS TO ANSWER.

The First Exception.

The 11th Article of the libel alleges "that the total freight "on the cargo at the charter rate was £1,390 6s. 5d.; that "the Companhia Industrial do Brazil, the agent of respondent "made up an account of the amount due on said cargo as "per charter-party, charging for 466,862 feet at $13.50 per 1,000 "feet, and for 47,394 feet at $13.50 less ½, the said two items "amounting to $6,729.17, and converted the same into pounds "sterling at the rate of $4.84 to the pound, amounting to "£1,390 6s. 5d., and credited themselves with £875 paid on "account, leaving as the balance due for the said freight the "sum £515 6s. 5d., which sum on or about the 7th day of "December the said Companhia Industrial do Brazil paid "Phipps Bros. & Co., to whom they had previously paid the "sum of £875 in advance. There was no other account or pay- "ments made for the freight on said vessel and *no amount "paid for demurrage* on said vessel and no account of demur- "rage was ever stated between the said Master or the said "Phipps Bros. & Co. and the agents of the respondents."

The libellants have excepted to the 11th Article of the

Answer on the ground that the same does not answer separately each separate allegation and matter of the 11th Article of the libel, in that the same omits to answer any of the above allegations of said article; and libellants point out the 23d and 27th Admiralty Rule as being violated.

The Twenty-third Admiralty Rule among other things states: "The libel shall propound and articulate in "distinct articles the various allegations of fact upon which "the libellant relies in support of his suit, *so that the defendant* "*may be enabled to answer distinctly and separately the* "*several matters contained in each article.*"

> *Note.*—The above rule is very specific. If the libel is to be framed for a certain purpose, to wit, so that the defendant *may be enabled* to answer distinctly and separately the several matters contained in each article, it is obviously the intention that he shall do so. He is not only required to answer but to answer distinctly and *separately*, and is not only required to answer the matter contained in each article, but to make his answer distinct and separate to the *several* matters in each article.

The Twenty-seventh Admiralty Rule provides: "The answer should be full and explicit and distinct to each "*separate article* and each *separate allegation* in the libel."

It would be hard to find more precise language.

In order that there could be no mistake, the words chosen to enumerate the requirements of the answer indicate an intention to hold the pleader to the strictest precision and permit no evasion. These requirements are:

1. The answer shall be full.

2. The answer shall be explicit.

3. The answer shall be distinct (*i. e.*, separate from any other) to *each* separate article and each *separate* allegation.

In the present case the pleader has utterly failed to answer any of the matters above set forth.

In admiralty and equity a failure to answer does not constitute an admission as is the practice under the State Code.

> The Dodge Healey, 4 Wash. C.C., 656.
> Young *vs.* Grundy, 6 Cranch, 51.
> The Dictator, 30 F. R., 699.

The Second Exception.

The 14th Article of the Answer sets forth the cesser clause of the charter-party, which is annexed to the answer as is also the bill of lading, as a defence. This is excepted to on the ground that it is insufficient and so the District Judge held on sufficient authority. See his opinion, 65 F. R., 104; Apostles, 124 to 138. The grounds stated by Judge Brown in this opinion are substantially those advanced by libellant's proctor on his argument in the District Court.

The charter-party contained the following clauses:

(**1.**) "For each and every day's detention by default of the "said party of the second part or agents, $59.46 U. S. Gold or "its equivalent per day, day by day, shall be paid by the said "party of the second part (*i. e.*, the respondents), or agents, to "the said party of the second part (*i. e.*, libellants) or agents."

(**2.**) "The bills of lading to be signed as presented without "prejudice to this charter."

(**3.**) "Vessel to have an absolute lien upon the cargo for all "freight, dead freight and demurrage."

(**4.**) "*Charterers' responsibility to cease when the vessel is "loaded and bills of lading are signed.*"

(**5.**) The vessel to be consigned to charterers' agent at port of discharges, inwards only, paying them a consignment commission, etc.

The bill of lading shows the shipment by the charterers "to "be delivered * * at the aforesaid port of Rio de Janeiro "unto **order** or their assigns, **they paying freight "for the said lumber as per charter-party.**"

The 14th Article of the Answer, which is the one excepted to, states that the bills of lading were assigned to Companhia Industrial do Brazil and were then assigned to Manoel da Cruz y Filho.

The clause of the charter-party requiring the master *to sign bills of lading as presented*, has been construed in many English cases.

Hanson vs. Harold (1894), 1 Q. B., 612. Lord Esher, Master of the Rolls (p. 619), speaking of the words of the charter requiring the bill of lading to be signed "without " prejudice to the charter-party," said:

> "The meaning of these words has been settled by " decisions which cannot be questioned. The meaning as " settled by the case of Shand *vs.* Sanderson, 28 L. J. (Ex.), " 278, and Gledstanes *vs.* Allen, 12 C. B., 202, is that it is a " term of the contract between the charterers and the ship- " owners that notwithstanding any engagements made by " the bills of lading, that contract shall remain unaltered. " Therefore in this case the captain was bound to sign the " bill of lading presented to him, but his doing so was to be " 'without prejudice to the charter-party.' These words " do not limit the obligations under the charter-party to " sign the bills of lading presented to him, but when he has " done so, it does not affect the contract contained in the " charter-party. If a ship-owner puts up a ship as a general " ship, he may insist on a bill of lading in any terms he " pleases, or he may refuse to take the goods. Here the " ship-owner deprives himself of that right and agrees to " sign bills of lading as presented. Therefore the captain " was bound to sign the bill of lading as he did."

In the same case, Lord Esher quoted and adopted the language used by him, in Clink *vs.* Radford (1891), 1 Q. B., 625, as follows (page 617):

> "In my opinion the main rule to be derived from the " cases as the interpretation of the cesser-clause in a charter- " party is that the Court will construe it as inapplicable to " the particular breach complained of, if by construing it " otherwise the ship-owner would be left unprotected in " respect of that particular breach, unless the cesser-clause " is expressed in terms that prohibit such a conclusion; in " other words, it cannot be assumed that the ship-owner, " without any mercantile reason, would give up by the " cesser-clause rights which he has stipulated for in another " part of the contract," and he came to the conclusion (p. 618) that where " the provisions of the charter-party " enables the charterers to make such terms with the ship- " pers that the lien which was created is not commensurate

"with the liability of the charterers under the charter-
"party, then the cesser-clause will only apply so far as the
"lien which can be exercised by the ship-owner is commen-
"surate with such liability."

Judge Davey said, at p. 621:

"I am of opinion that it must be taken to be the fault of
"the charterers that the lien which they contracted in the
"charter-party to create or procure for the ship-owner was
"not created or procured."

It is familiar law that the endorsee of a bill of lading is liable only for the terms of the bill.

In this case, the bill required the delivery of the cargo on payment of the freight as per charter. If there had been a delay on the part of the consignee of the bill of lading in receiving the cargo, it would create a liability for damages *in the nature of* demurrage, but not at the rate specified in the charter-party, nor for the despatch provided for in the charter-party.

In re Bags of Linseed, 1 Black, 108 (1861), Chief Justice Taney said (112):

"The rights of the parties in this case depend altogether
"on the contract made in the bill of lading. That instru-
"ment does not refer to the charter-party, nor can the
"charter-party influence in any degree the decision of the
"question before us. Augustine Wills was not a party to
"it and it is not material to inquire whether he did or did
"not know of its existence and contents, for there is noth-
"ing in it to prevent Wills & Co., the sub-charterers, or
"Augustine Wills, the consignee, from entering into the
"separate and distinct contract stated in the bill of lading,
"and the assignee took the rights of Wills & Co. in this
"contract and nothing more."

The distinction between the cases where the bill of lading fixes the rate of freight by reference to the charter-party, and the cases where "all other conditions of the charter-party" are incorporated into the bill of lading is a well recognized one.

Thesiger, *J.*, says, in *Porteous* v. *Watney* (1878), L. R., 3 Q. B. D., 534, at page 537:

"The cases of Chappelle *v.* Comfort, 10 Q. B. (N. S.), "802; Fry *v.* Chartered Bank of India, L. R., 1 C. P., 698, "and Smith *v.* Sieveking, 4 E. & B., 945; 5 E. & B., 589, "which have been cited on behalf of the defendants in the "present case, so far from weakening the authority of "Wegener *v.* Smith, 15 C. B., 285, appear to me to tend "still further to strengthen it. In each of them the "reference to the charter-party contained in the bill of lad- "ing was either expressly by the use of the words, 'freight "'as per charter-party,' as in the two first cases, or impliedly "by use of the words, 'paying for the said goods as per "'charter-party,' as in the last case, **limited** to the con- "dition in the charter-party relating to freight and was held "to be made simply for the purpose of ascertaining the "rate of freight, and not for the purpose of imposing an "obligation upon the holder of the bill to perform the con- "ditions of the charter-party generally."

The Third Exception.

The 13th Article of the answer alleges that "when said vessel "arrived at Rio the owners of the cargo used all *reasonable* dili- "gence in and about *receiving* the cargo shipped upon the said "vessel and removing the same therefrom.

"*That libellants were prevented from discharging the same* "and respondents were prevented from receiving the same any "sooner than they did, *by reason of the acts of the public* "*enemy* * * and that the detention alleged in the libel * * "was caused by said acts of the public enemy *and not* by any "default of respondents.

"That the captain * * acquiesced in the delay and recog- "nized the necessity therefor."

The exception is that the above allegations constitute no defence.

The charter-party provides:

"Cargo to be *discharged* at port of destination at the average "rate of not less than 20,000 superficial feet per running day, "Sundays excepted. Lay days to commence from the time

" the vessel is ready to receive or discharge cargo, and written " notice thereof is given to the party of the second part " (charterer) or agent, and for each and every day's detention " *by* **default** *of the said party of the second part* (charterer), " or agent, $59.46 U. S. gold per day, *day by day* shall be paid " by the said party of the second part (charterer), or agent, to " the said party of the first part (libellants), or agent.

" Vessel to discharge at a **safe** anchorage ground in Rio " Bay, *designated by charterers.*"

Points on Third Exception.

Two questions are presented:

(1) Were the respondents in *default?*

(2) Does the allegation that "libellants were prevented from " discharging the vessel by reason of the acts of the public " enemy " excuse the respondent's default?

The Safe Anchorage.

The charterers were under an *absolute* engagement to designate a **safe** anchorage at which the vessel could discharge.

Preliminary Observation. The commanding position England's commercial marine has attained is well known, and one of its causes can be traced by the student of political economy to the strict enforcement by British Courts of the terms of charter-parties, and their leaning, when there was doubt, to the shipowner's side. When her vessels are delayed in port, one of the great sources of the wealth and prosperity of the "Mistress of the Seas" is suspended. It is like stopping the machinery from producing, and every hour's delay is a national loss. Therefore, to spur the energies of the charterer and hasten the despatch of the vessel became a matter of national importance, of public policy, and for many years the greatest consideration has been given to all claims, no matter how small, of the shipping interest.

We find her most distinguished counsel engaged in cases where the amount involved would here be considered insignificant, and her Courts treating the questions raised with painstaking study and deliberation.

Thus, in Thiis *vs.* Byers, 1 Q. B. D., 244, C. Russel, Q. C., and Hershell, Q. C., were opposed, and the stake was £40. In Davies *vs.* McVeigh, 4 Ex. D., 265, C. Russel again appeared for the shipowner, who was sued for £80.

Ogden vs. Graham (1861), 1 Best & Smith, 773, 31 L. J., Q. B., 26; Carver on Car. by Sea, § 451.

Charter of ship Respigadera from Swansea with iron and coals to "*a safe port in Chili* (with leave to call at Valparaiso), or so "near thereto as she may safely get, restraints of Princes and "Rulers excepted.* 25 working days for discharging, to com- "mence from notice being given of the vessel being ready to "deliver."

The vessel arrived at Valparaiso April 2, 1850, and on April 4 the captain demanded that he receive *orders* for her port of discharge (48 hours having expired) and gave notice that lay days commenced *that day.*

He was ordered to Carrisal Bajo to discharge. That port was closed by the government of Chili, but both charterers and shipowner were ignorant of this, but the *charterers' consignee knew it when he ordered the vessel there* and that the vessel was liable to confiscation if she unloaded there without a permit. The port was closed as the district was *in rebellion*, but was *by nature a safe port* (777). The vessel lay at V. 38 days, and after the rebellion was suppressed, went under permit to C. B. and discharged. The order to discharge at C. B. was *bona fide*, as the cargo was intended for that port by the charterers. The defendants' counsel contended that *safe* meant physically safe and the rebellion being the cause of its being closed came under the exception of restraints of princes and rulers, citing Spence *vs.* Chadwick, 10 Q. B., 517.

Wightman, *J.* (779):

"Was such a port "safe" within the meaning of the "charter-party. * * *

"As C. B. was a port into which a vessel could not enter "without confiscation, it seems to me clearly not within the

* Not "mutually excepted."

"terms contemplated by the parties * * : the charterers "must pay the damages occasioned by the breach of con- "tract *in* **not naming** *a safe port*, to which they have "made themselves liable by the specific terms of the con- "tract."

Blackburn, *J.* (781):

"In the absence of all authority, I think that on the con- "struction of this charter-party, the charterers *are bound to* "*name a port*, which at the time they name it, is in such a "condition that the master can *safely* take his ship into it; "but, if a certain port be in such a state that although the "ship can readily enough, so far as natural causes are con- "cerned, sail into it, yet *by reason of political or other* "*causes, she cannot enter it without being confiscated by* "*the government of the place; that is not a safe port within* "*the meaning of the charter-party.*"

Judge Blatchford in Sleeper *vs.* Puig, 17 Blatch., 40, affirmed the District Court and in doing so, said:

"It was held by the Court below * * that a delay in "finding a place to discharge is as much within the mis- "chief sought to be obviated by the requirement of 'dis- "'patch for discharging' in the charter-party as a delay in "receiving the cargo after the vessel reaches the wharf; "and that the *respondents are liable for all delay* from the "time of the reporting of the vessel at her anchorage near "the mole in readiness to deliver her cargo."

To the same effect is Davies *vs.* McVeagh, 4 Ex. D., 269.

The Number of Lay Days was Fixed.

By the charter the number of days given to discharge the cargo is fixed by computation, *i. e.* 20,000 ft. a day, and as the cargo to unload was 514,256 ft. (see Art. 4 of Libel, admitted by Art. 4 of Ans.) it followed that 26 days was the fixed time.

Hall *vs.* Eastwick, 1 Lowell, 456.

Carver on Carriage by Sea, § 610.

"Frequently the time allowed is not definitely calculated, " but is to be that required by the 'usual despatch of the " 'port,' or 'the usual and customary time,' leaving that " to be estimated if need be; *or it may be that the cargo is to* " *be discharged* **at the rate** *of so many tons per day.*"

§ **611.** "The difference between charters in which a **spe-** " **cific time** is allowed, whether for loading or unloading, " and those in which the lay days are wholly undefined, is " thus of great importance. In the one case *the time is* " *limited* without regard to the circumstances under which, " when the time arrives, the contract has, in fact, to be " performed. * * .

" When the time is definitely fixed, or is described so as " to be calculable beforehand there is an *absolute* obligation " on the charterer to have the work completed within that " period, whatever circumstances occur. He is answerable " although the completion may have become *impossible* " owing to causes which have arisen without any fault or " omission on his part. Thus he bears the risk of delay " arising from the crowded state of the place at which the " ship is to load or discharge (Randall *vs.* Lynch, 2 Camp., " 352), or from frost (Barrett *vs.* Dulton, 4 Camp., 333), or " bad weather (Thiis *vs.* Byers, 1 Q. B. D., 244), prevent- " ing access to the vessel; or from acts of the Government " of the place prohibiting export, or preventing communi- " cation with the ship (Parker *vs.* Hodgson, 3 M. & S., 267; " Blight *vs.* Page, 3 B. & P., 295, n.).

" *And it is immaterial that the shipowner also is* **pre-** " **vented** *from doing his part of the work within the* " *agreed time;* unless he is in fault. *The charterer takes* " *the risk.*"

Carver on Carriage by Sea, § 608.

" The undertaking as to the time which the loading or " discharge shall occupy *is given by the freighter, not by* " *the shipowner.* * * The promise is made by the " freighter *for the benefit of the shipowner.*"

Davis vs. Wallace, 3 Clifford, 131, Clifford, *J.*

"The settled rule is that where the contract of affreight-
"ment expressly stipulates that a given number of days
"shall be allowed for the discharge of the cargo, *that*
"*such a limitation is an express stipulation that the*
"*vessel shall in no event be detained longer for that pur-*
"*pose*, and that if so detained it shall be considered as the
"delay of the freighter, *even where it was not occasioned by*
"*his fault, but was inevitable.* Where the contract is that
"the ship shall be unladen within a certain number of days,
"it is no defence to an action for demurrage that the over
"delay was occasioned by the crowded state of the docks
"or by port regulations, or government restraints. *Deten-*
"*tion* of the vessel for loading or discharging longer than
"the time allowed by the contract entitles the owner to the
"stipulated demurrage, although it was *impossible* to com-
"plete the work within that time by natural causes.
"Randall *vs.* Lynch, 2 Camp., 352; Barrett *vs.* Dutton, 4
"Camp., 233; Hill *vs.* Idle, 4 Camp., 327; Furnell *vs.*
"Thomas, 5 Bing., 188.

A Review of the English Cases.

Cargo ex Argos (1872), 5 P. C., 161. Sir Montague E. Smith.

"The *agreement to pay demurrage after 24 hours* clearly
"implies that the parties contemplated that the ship might
"be *detained* by his **default** to '*take out*' the goods
"and that it was not intended the master should land or
"take the risk of landing them. The prohibition to land
"the petroleum therefore did not prevent the plaintiff (ship
"owner) from fulfilling his part of the contract."

"In Waugh *vs.* Morris (L. R., 8 Q. B., 202), the plaintiff
"recovered for the detention of his ship although *it was not*
"*possible to land the hay* anywhere in the port of London.
"The contract of the shipper in that case does not in their
"Lordships view substantially differ from the defendants in the
"present."

Cites Ford *vs.* Cotesworth, L. R., 4 Q. B., 127, *id.*, 5 Q. B., 544 and points out difference.

Thiis vs. Byers (1876), 1 Q. B. D., 244.

On the trial before Gove, J., it appeared that deft. chartered plffs. vessel for a voyage from Pensacola to a port in Untited Kingdom. In charter was the clause, "16 working days to be "allowed the said merchants for loading at P. and *to be dis-* "*charged at such wharf or dock as charterers may direct,* "*always afloat in 14 like days.*"

Vessel was ordered to Middleborough and arrived at the usual place of discharge in river Tees and began discharging. "It "was the masters duty, by the practice of the port to put the "timber over the ships side *and form it into rafts*, and the "consignee then sent steam tugs to carry it away. *After the* "*discharging had begun rough weather came on, during which* "*the master though ready was unable to put the timber over* "*the side and form it into rafts*, and consequenly it was not "possible for the charterers to take any timber away, though "the ship remained at her anchorage, *and the tugs could have* "*towed the timber away if it could have been formed into rafts.* "The unloading was thus delayed owing to the rough weather "four days."

A verdict was taken for the plaintiff which included £40 for demurrage and leave was given to move to reduce the verdict by £40 if the Court should be of the opinion that by the *true construction* of the charter deft. was not responsible for the delay occassioned by the bad weather.

C. Russell, Q. C., moved:

"The deft. is not liable for the *delay* in unloading the "ship where the unloading, as here is the *common employ-* "*ment* of the ship and freighter. It was the duty of the "ship to discharge the timber over the side and form it into "rafts, and then the defendant to send tugs and take it "away. The *default was in the ship* for if the rafts had "been formed the tugs could have towed it away. The "unloading being the *common employment* of both parties "neither is liable for delay caused by *vis major*. Ford *vs.* "Cotesworth, L. R., 4 Q. B., 127; L. R., 5 Q. B, 544. "Herschell, Q. C., for plff. pointed out (248) that as the "master and crew were *ready and waiting*, the delay was "not theirs."

The judgment of the Court (Blackburn & Lush, *JJ.*, was delivered by Lush, *J.* (249):

"*We took time to look into the authorities,*"

Nota Bene. The Court forecloses any idea of hasty conclusions and consequent bad law.

"and are of opinion that *where a given number of days* is "allowed to the charterer for unloading, *a contract is im-* "*plied* on his part, that, from the time the ship is at the "usual place of discharge *he will take the risk* of any ordi- "nary vicisitudes which may occur to prevent him from "releasing the ship at the expiration of the lay days. This "is the doctrine laid down by Lord Eilenborough in Ran- "dall *vs.* Lynch, 2 Camp., 355, which was upheld by this "Court and it has been accepted as the guiding principle "ever since: See Leer *vs.* Yates, 3 Taunt., 387; Harper "*vs.* McCarthy, 2 B. and P. (N. R.), 267; Brown *vs.* John- "son 10 M. and W. 331, and the other cases cited in the "argument."

Davies vs. McVeagh (1879), 4 Ex. Div., 265, Crt. of Ap. Charter: "Vessel to load in B. M. Dock or W. Dock. Vessel next day after charter was, as a matter of favor, admitted into W. Dock, but owing to regulations of dock authorities did not begin to load till 14 days later.

Charter gave 19 running days to load and discharge. Delay occurred in discharging, so that 20 days elapsed after the 19 running days—if calculated from the time of admission to dock.

Plff. paid £80, *i. e.*, £4 a day for 20 days, under protest, and sued to recover it back. Held, the action would not lie.

C. Russell for defendant claimed Thiis *vs.* Byers, 1 Q. B. D. 244, applied.

Bramwell, *J.*

"When a ship is to take on a cargo at a specified place "of loading the responsibility rests, not with the owner, "but with the charteres, if the specified berth *is not in a* "*fit state* to receive her upon her arrival at the appointed "time * * * I think it may be laid down that a vessel "has reached the *place of loading* as distinguished from "the spot of loading when she has entered the port from "where her voyage is to commence.

Postlethwaite vs. Freeland, 5 Ap. C., 617.

Blackburn, *J.*

"As the merchant, if not himself resident at the port of "discharge, at all events has a consignee and correspondent "there resident, he presumably knows all about the means "and appliances for discharging a ship there, better than "the shipowner. *It, therefore, seems very reasonable that "the shipowner in making his bargain should require the "merchant to make an estimate of the probable time of dis-"charging the ship, and take on himself the risk of that "time being exceeded*; and then the shipowner can fix the "payment he is willing to take with reference to this, and "this has long been done by providing lay days and de-"murrage days for discharging. In the last edition of "Abbott on Shipping, published while Lord Tenterden "was living, it was said (5 ed., 180) * * * 'And where "'the time is thus expressly ascertained and limited by the "'terms of the contract, the merchant will be liable to an "'action for damages, if the thing be not done within the "'time, although this may not be attributable to any fault "'or omission on his part, *for he has engaged that it shall "'be done.*'

"These last words are put in italics by Lord Tenterden. "It still remains the more usual form of charter-party to "insert lay days and demurrage days.

"In many of the cases cited on the argument at the bar "the charter-parties were of this nature, and the question "only was whether the lay days had begun to run. Tap-"scott *vs.* Balfour, L. R., 8 C. P., 46, was of this nature, "for though the charter-party did not name a specific "number of days, it provided that the ship was 'to be "'loaded by the defendants **at the rate of 100 tons "'per working day**,' and as the burden of the ship "was known and *id certum est quod certum reddi potest*, "this was equivalent to naming a certain number of days."

Leer vs. Yates (1811), 3 Taunt., 387, Mansfield, *C. J.* Goods under other cargo could not be discharged within the lay days. Held, cargo owners liable for damages.

"But it is not in truth the fault of either the plaintiff or "defendant that the goods could not be taken out."

Porteous vs. Watney; **Straker vs. Kidd** (1878) 3 Q. B. D., 226, Lush, *J.*

"Now, the only thing which prevented the delivery in "the present case was the inability of the master *to get at* "*the goods* because they were stowed at the bottom of the "hold, and because the owners of the super-incumbent "goods had neglected to take those goods away in proper "time. Can this neglect of the other consignees be said to "be the **default** of the master? If not, it is immaterial "whose fault it was, *for the defendants undertook that* "*whether they were able to get away their goods or not, they* "*would pay demurrage if the ship was not cleared within* "*the stipulated period*, the contract being as I have said an "**absolute,** and not a conditional contract. Now, it is "clear that the master was not in **default.** *He was ready* "*and anxious to deliver.*"

S. C., 3 Q. B. D., 534. Affd. by Court of App. Theisinger, Cotton and Brett, *JJ.*

Brett, J. (543).

"The defendant is to pay unless it is the **fault** of the "ship owner."

Randall vs. Lynch (1810), 2 Camp., 352, Ld. Ellenborough:

"The question is whether the detention of the ship, "arising from the inability of the London Dock Co. to dis- "charge her, is, in point of law, imputable to the freighter, "and *I am of opinion that a person who hires a vessel de-* "*tains her, if at the end of the stipulated time he does not* "*restore her to the owner.* He is responsible for all the "various vicisitudes which may prevent him from doing so. "* * The defendant is as much responsible for a delay "arising from the want of a berth as if it had arisen from "*tempestrous weather*, or any other cause."

Barker vs. Hodgson (1814), 3 Maule & Selwyn, 267: In consequence of an *infectious disorder* at Gibraltar, all intercourse with ships was prohibited and deft. could not load a cargo on brig Providence within the 60 running days allowed by the charter. Lord Ellenborough, *C. J.:*

"Is not the freighter the adventurer *who chalks out the* "*voyage* and is to furnish at all events the subject matter "out of which freight is to accrue? * * But if in con- "sequence of events which happen at a foreign port, the "freighter *is prevented* from furnishing a loading there, "the contract is neither dissolved, nor is he excused for "not performing it, but must answer in damages." Judgment for plff.

Barrett vs. Dutton (1815), 4 Camp., 333: Gibbs, *J.*, held that where a certain number of running days were allowed for loading, the freigter is liable for delay caused by the *impossibility of loading owing to ice in the river*, although the vessel could not have sailed if loaded.

Bessy vs. Evans (1815), 4 Camp., 131: 30 days for loading and unloading cargo allowed. Discharge stopped by Custom officers. Lord Ellenborough:

"At the expiration of the 30 days I think you became "liable for demurrage, although you have been *prevented* "from unloading the goods, by the wrongful act of a "stranger."

Grant vs. Coverdale, 9 P. C, 470: Charter of SS. Merrythorpe. Steamship was to proceed to Cardiff and East Bute dock and there load a cargo of iron; cargo to be supplied as fast as steamer can receive, except in case of frosts preventing the loading. The ship loaded part of her cargo. A frost set in which made a canal which communicated with the dock impassable, so that cargo ready at a wharf on the canal could not be brought in lighters to the dock. Held (Affg. Ct. of Ap.), that the frost did not "prevent the loading." Lord Selbourne says, p. 477:

"I infer from the finding of the referee, that the whole "*might have been done by carting*, though I agree that it "would have been at an expense which was preposterous "and unreasonable, if you were to look at the interest of "the charterer; but if the charterer has engaged that he "will do a certain thing he must of course pay the damage "which arises from his not doing it, whatever the cause of "his not doing it may be, whether it be his not being "willing to incur an unreasonable expense, or whether it "be any other cause."

Budgett vs. Binnington, 25 Q. B. D. 320. Plaintiffs were endorsees of a B/L for a cargo of barley shipped on S.S. Fairfield, "all conditions as per charter party," by which the cargo was to be taken *from alongside* the steamer at freighters expense and risk. *Seven running days* were allowed for unloading. B/L contained the usual exceptions, but neither it nor C/P contained any reference to strikes.

The F. arrived at Bristol and her lay days commenced Nov. 25th.

At Bristol, grain cargoes in bulk are discharged by the *joint* action of the consignee and shipowner. The consignee furnishes bags and "*bushellers*" to fill the sacks, and the shipowner hoists them to the deck and put them on scales and consignee weighs them. Different stevedores were employed by the shipowner and consignee. On Nov. 28 the laborers employed by both firms of stevedores *struck*, and no cargo was discharged until Dec. 4. The shipowner claimed demurrage and consignee paid £147 *under protest*, and sued to get it back.

The jury found that **shipowner** (deft.'s) **were not ready** *to perform their part of the discharge*, and the judge left the parties to move for judgment.

The judgment of the court (Denman, Charles and Vaughan Williams, *J. J.*) was read by V. W. (325), and at 326 he states the *contention* of plff., "that readiness and willingness of the "master to deliver the cargo to the consignee is a *condition* "*precedent* the non-existence of which, according to the finding "of the jury, disentitles the master from claiming this de-"murrage."

Or if it is not a condition precedent, "it is something which "the master has to do on his part *concurrently* with the part "which the consignee has to take in the unloading of the ship, "and therefore * * the master cannot demand perform-"ance by the consignee of his part without avering readiness "and willingness, if not a tender of performance of the *condi-"tions concurrent* due from him, which, for the purpose of "effectively making his demand on the consignee, become con-"ditions precedent."

Judge Williams says: "While approving of those conten-"tions, so far as relates to conditions precedent, *we are of the "opinion that they are not applicable to the present case, and "therefore afford no ground for holding that the master was "not entitled to claim demurrage.*"

"The fact is that the obligation of the consignee to pay de-
" murrage is '**absolute,**' as was decided in Thiis *vs.* Byers,
" 1 Q. B. D. 244." *

" *The readiness and willingness of the master to make*
" *delivery is not the consideration of or a condition precedent*
" *to the undertaking to pay demurrage for the detention of the*
" *ship*, and this being so it is not sufficient to relieve the con-
" signee of the obligation to pay demurrage, that he should
" show that the master was *unable* to perform some obligations
" undertaken by him in the charter party ; *but it must appear*
" *that the consignee was prevented* from discharging the ship
" within the time allowed for unloading *by the act of the master*,
" or those for whom *he* was responsible. If this were not so, the
" master would not have been entitled to recover demurrage in
" the cases of Thiis *vs.* Byers, 1 Q. B. D., 244 ; Porteus *vs.* Wat-
" ney, 3 Q. B. D., 227 ; Straker *vs.* Kidd, 3 Q. B. D., 223 ; for in
" each of these cases, it is plain from the facts, that *the master*
" *was not ready and willing to make delivery*, because he was
" prevented, in the one case by the weather, and in the other
" cases by the non-removal by third persons of the superincum-
" bent cargo. It is quite true that in Straker *vs.* Kidd (3 Q. B.
" D., 223) at p. 226, Lush, *J.*, speaks of '*an implied condition*
" '*that the shipowner shall be ready and willing to deliver*,"
" but his meaning is made plain by the next sentence in his
" judgment, where he says : '*If he* (the master) **wrong-**
" '**fully refuses** *to give over his goods, or if by reason of*
" '*any default of* **his**, *or for any obstacle for which* **he** *is*
" '*responsible, the consignee is unable to get his goods, this*
" '*would afford a good answer to the claim ;*" and again, after
" stating that the contract is *absolute*, and not conditional, the
" learned Judge says : '*The defendants are therefore liable,*
" '*unless they can show* that some act or *default* of the owner,
" ' or of some one for whom he is responsible, prevented them
" ' from performing their contract.' "

" In the present case the plaintiffs were not prevented from
" performing their contract by any **default** of the shipowner,
" or those for whom he was responsible. It was the action of
" the stevedores and dockers, which alike prevented the
" plaintiffs and defendants from doing their part in the unload-

* So also in Porteous *vs.* Watney, 3 Q. R. D. 226.

"ing. This in no way relieved the charterers from the *absolute* "contract to pay demurrage for the delay and detention of the "ship during unloading.

"If the strike of the stevedores had resulted from unreason- "able conduct of the master in refusing reasonable wages "asked by the stevedores, the case *might* have been different "* * *but even in such a case the charterer would, in our* "*opinion, have to show that he was* **actually prevented** "**by the default of the shipowner**; *i. e.*, that there "was no available means of performing the contract, *notwith-* "*standing the default of the* shipowner. See Alston *vs.* Her- "ring, 11 Exch., 822. If such means were available, the "charterer must avail himself of them to discharge the ship, "and take his remedy by sueing the shipowner for breach of "contract, or he will be liable to demurrage."

Judgment for defendants.

Plaintiffs appealed, 1891, Q. B., 36.

Cohen, Q. C., for plaintiff (36).

"The question is, whether the shipowner *who is in* "*default* can recover demurrage?"

Bucknill, Q. C., for defendant (4).

"The contract to pay demurrage is an *absolute* contract, "except so far as the delay may be caused by the *default* "of the shipowner or his servants."

Appeal heard by Esher M. R., Lindley and Lopes, *JJ.*

Esher M. R.: "This is a contract *by the freighter*, by "which he undertakes under certain circumstances to pay "demurrage. * * It has been held that the demurrage "contract, *where a fixed number of lay days is mentioned*, "is a contract by the freighter, that *if the ship is detained* "*over those days, he will pay demurrage for so long as the* "*ship is in such a condition that she cannot be handed* "*back for the use of the shipper* (*shipowner?*). This has "been called an *absolute* and independent contract, and it "is obvious that *a contrast* is intended to be drawn between "such a contract and a conditional one, *and that by an* **ab-** "**solute** *contract is meant an unconditional one.* The "only condition attached to it is, that the lay days shall "have commenced and run out, and that condition being "fulfilled, the obligation arises.

"*Directly the shipowner shows this state of facts, he has* "*proved his case*, and it lies on the other side to show, not "that there has been no breach of contract, but *that he is* "*excused from the performance*—in other words, his case "is one of confession and avoidance, **and the whole** "**burden of proof is on him.** * *

P. 39.

"*Of this I am certain, that if the shipowner is pre-* "*vented from carrying out his share of the discharge* "*by the acts of persons over whom he has no control,* "*the case comes within the same category as the case* "*of non-delivery caused by some physical misfortune* "*over which he has no control.* In such a case it has "been decided that he is not prevented from enforcing "the contract of the freighter — as, for instance, in the "case of prevention by weather or the acts of other con- "signees preventing a lower cargo being taken out of the "vessel. * * That reduces the matter to the question "whether there has been *default* by any persons for whom "the defendants are responsible. * * The shipowner "had no control over these workmen, and is not respons- "ible for the consequences of their acts, and consequently "there is nothing to relieve the consignee from the *absolute* "contract to pay demurrage. This is no new principle of "law but only a question whether the facts bring this case "within a recognized rule of law."

Lindley, *L., J.*:

"On whom does the risks of strikes fall in a contract "such as this, were the risk is not expressly excepted from "the risks which the freighter is to bear? The contract "was to discharge the ship, in a certain number of days. "* * The stipulation is in terms unconditional and it "has frequently been called an *absolute* contract by which "I understand an unconditional contract. * *

"It is argued that * * the shipowner shall be able "and willing to do his part in the unloading, and that if he "is not so able and willing the freighter is relieved from "the consequences of a breach on his part.

"Such a statement is far too wide; for if it were true,

" the cases of Thiis *vs.* Byers, 1 Q. B. D., 244; Porteous *vs.*
" Watney, 3 Q. B. D., 227, 534; and Stracker *vs.* Kidd,
" 3 Q. B. D., 223, would have been improperly decided."

Lopes, *J.* (41):

" There is an essential difference between the cases where
" a specific time is allowed, for loading and unloading, and
" cases where the lay days are not defined.

" In the former case the time is limited without reference
" to subsequent events. * * This is then, as I have said,
" an *absolute* contract on the part of the merchant to have
" the cargo unloaded within a specified time.

" *In such case the merchant takes the risk.* * * I can
" find no *default* in the ship. The strike was an unforeseen
" occurrence over which the ship had no control."

Ford vs. Cotesworth, Reviewed.

Carver on Carriage by Sea, § 616.

Comments on Ford *vs.* Cotesworth, L. R., 4 Q. B., 127, affd. L. R., 5 Q. B., 544. The vessel while discharging at Callao was ordered to stop discharging by the Government, out of fear of a Spanish fleet and then ordered to remove (which she did) out of cannon range.

Blackburn, *J.*, said, L. R. 4 Q. B., 133:

" The question depends upon *what the contract* **implied**
" **by law** *is*, where there is a charter party *silent as to*
" *the time* to be occupied in the discharge. * *

" Where the act to be done is one in which both parties
" to the contract are to concur and *both bind themselves* to
" the performance of it, there is no principle, on which, *in*
" *the absence of a* **stipulation** *to that effect either ex-*
" *pressed by the parties, or to be collected from what they*
" *have expressed*, the damages arising from an unforeseen
" impediment are to be cast by law on the one party more
" than on the other, and consequently we think that what
" is implied by law in such case is, not that either party

"contracts that it shall be done within either a *fixed* or a "reasonable time, but that each contract that he shall use "reasonable diligence in performing his part."

On affirming, L. R., 5 Q. B., 544, Kelley, chief baron, said:

"The delivery of the cargo at the port of destination is "one entire act, in which both parties have to perform "their parts. The defendants have to provide lighters, "and the plaintiffs to assist in putting the goods over the "side of the ship—and the plaintiffs were as much pre- "vented from doing their part as the defendants."

Carver's Comment on the above is:

"It is however, difficult to understand how the decision "in that case can have depended upon the *joint* inability "of the merchant and shipowner. Though the discharging "was a matter in which both parties had to take part, *it* "*appears that the master of the ship would have been able* "*to perform his part*, that is, the putting the goods out of "the ship into the lighters, had the lighters been there

"The disabling cause directly affected the charterers' operations only.

"Moreover, if the charterer in Ford *vs.* Cotesworth would "have been liable for the delay, but for the fact of a *joint* "inability to perform the work of discharging, **it would** "**seem that, in cases where the facts are** "**similar, he ought also to be relieved from** "**liability, although a definite time may** "**have been fixed by the contract.** But that "is clearly not the rule."

Carver, § 150.

"It has been said that the clause of exceptions in the "charter-party is introduced for the benefit of the master, "not of the merchant—Per Lord Alvanley, Towteng *vs.* "Hubbard, 3 B. & P., 298; and in Bligh *vs.* Page, 3 B. & "P., 295, n, Lord Kenyon held that the *charterer* was not "excused from providing a cargo where that had been pre- "vented by a prohibition of the Russian Government, "*though the charter excepted restraints of princes and* "*rulers during the voyage.*"

Note.—There is no "*Restraints of Princes*" clause in this charter.

By Default of Charterer.

In almost every mortgage a clause is inserted that the whole amount shall become due "*upon default*" in paying interest.

In the Statute of Frauds the word "*default*" occurs in the phrase "debt default or miscarriage."

Brown, St. of F., § 155.

"Perhaps the strictest etymological rule would be that "which was suggested by Lord Ellenborough in Castling "*vs.* Aubert, 2 East, 325, namely, that "debt" and "de-"fault" *both refer to a liability accruing upon a contract,* "but the former to such as is already incurred, the latter to "such as may be incurred at a future time."

Note.—The clause of the charter in question which reads: "And for each and every days detention by *de-*"*fault*" of the said charterer—must be read in connection with the clause, "Vessel to discharge (a continuous "act) at *safe* anchorage ground in Rio Bay *designated* "by the charterers."

Is it not clear that there was a continuous duty to designate a *safe* anchorage for each day's discharge and that a failure to do so would be a *default?*

The detention might be by the omission of the vessel—and yet the charterer be liable within the decision of Budgett *vs.* Buddington, 25 Q. B. D., 320, where Judge Williams said:

"If the strike of the stevedores had resulted from un-"reasonable conduct of the master refusing reasonable "wages asked by the stevedores, the case might have been "different * * *but even in such a case the charterer* "*would, in our opinion, have to show that he was actually* "*prevented by the default of the ship-owner, i. e.,* that "there was no available means of performing the contract "of the ship-owner. If such means were available the "charterer must avail himself of them to discharge the "ship, *and take his remedy by suing the ship-owner for* "*breach of contract,* or he will be liable to demurrage."

1,600 Tons Soda, 61 F. R., 849, C. C. of Ap., 9th C.

Charter allowed for the loading and discharging of said vessel 30 working lay days, to commence 24 hours after her

inward cargo is discharged—and for every day's detention *by default* of charterer demurrage, etc.

Vessel received instructions to load at Caleta Buena, in Chile, and while on her way there civil war broke out.

Gilbert, *J.*:

"Was the delay in loading occasioned by the *default* of "the charterers. * * In the absence of a clause limiting "the liability of the charterers to cases where the detention "shall occur from the *fault or default* of the charterers or "from some accident or cause specifically named, the obli- "gation to pay demurrage is an *absolute* one. * * But "in this case there is inserted in the demurrage clause a "limitation of the liability of the charterers in loading or "dischargiug. It is stipulated that they shall be answera- "ble only from detention which may result from their "*default.* To what extent does this provision modify "their obligation?

"There is in the use of the word '*default*' no necessary "imputation of negligence. *As used in such an instru- "ment it can mean only the non-performance of contract "duty*, a failure of one of the contracting parties to do that "which he has contracted to do."

P. 853:

"In the case of Dow *vs.* Hare (Fed. Cases No. 4037a) an "unreported decision of Judge Hoffmann in the D. C. for "the N. D. of Cal. *and affirmed on appeal* to the Circuit "Court, the charterer had chartered the ship to carry a "cargo of coal to the steamer Saranac. When the char- "tered vessel arrived at the designated port, the Saranac "was not in port. *She had been wrecked and lost at sea.* "The vessel after waiting during her lay days and for "several days thereafter, discharged her cargo on the "wharf and brought suit for demurrage. It was urged in "defence of the action that the charterers were not liable "inasmuch as the detention was not due to their '*default.*' "In delivering the opinion, the Court said: * * By the "bill of lading the Saranac was the consignee to whom the "coal was to be delivered. The consequence of her un- "punctuality ought rather to be borne by the party whose "agent she was, and who had particularly stipulated that

" she should be ready to receive the whole cargo within ten " days after the ship arrived, rather than the shipowner, " who was a stranger to the contract."

Booge vs. Cargo of Dry Boards, 42 F. R., 335. In this case the **weather** prevented the loading within the lay days and Benedict, *J.*, held this to be the *default* of the charterers, citing Thiis *vs.* Byers, 1 Q. B. D., 244. In doing so he overruled the case of **Cargo of Mary E. Taber** (1867), 1 Ben., 105, where he had construed the same word and held that the delay being caused by bad weather was not by *default* of the charterer.

The Fourth Exception.

The 16th Article of the answer alleges that " the agents of " libellants accepted from the consignee £515 6s. 5d. in full " satisfaction and payment of all claims and demands under " said charter-party and an account was made and stated " between said agent of libellants and said consignees respecting " all claims under the charter-party aforesaid and the balance " due upon said accounting was paid by the said consignee to " said agents and accepted and received by them in full satis- " faction thereof."

There is no allegation that the alleged agents (who are not named) *had authority* to accept £515 6s. 5d. in satisfaction of claims for $3,159.38 demurrage (Libel Art. 11), and $6,729.17 freight (Libel Art. 11), and the exception is to the sufficiency of the article as a defence.

If purporting to act under a power of attorney, it is obvious that the powers of the special agent would be restricted to the four corners of the paper (Dunlaps Paley's Agency, p. 201). Does it make any difference that the paper is called a charter-party. If the master can compromise demurrage, he can compromise freight, and accept one-half the rate provided, or he can enlarge the number of lay days and thus reduce the demurrage or decrease the rate of demurrage and reach the same

result. Such power he has not got, and it would be dangerous to entrust him with it. The charterers have the charter and that tells them what their contract obligations are and that they are dealing with an agent whose *duty is expressed in the paper*, viz., collect the agreed freight and demurrage.

Dunlaps Paley's Agency, p. 201: "Nor can an agent "without an express authority compound a debt."

Abbott on Shipping (12 Eng. ed.), p. 89:

"But if the owners themselves have made *a speeial con-*
"*tract* for the employment of their ship, the master cannot,
"by the general and implied authority of his character as
"master only, annul such a contract, and substitute
"another for it, with the other contracting party."

In other words, by this charter, the shipper had 26 days (by computation) to discharge in. The master could not give him 30, nor change the rate of $59.46 fixed by the charter for each day's demurrage, and if he could not do so directly, he certainly could not do so indirectly by an "accord and satisfaction."

Even an attorney-at-law has no power to compromise.

Holker *v.* Parker, 7 Cranch, 436.

Burgon *v.* **Sharpe**, 2 Campbell, 529. Action for freight and demurrage, on a memorandum for a charter: voyage from London to Buenos Ayres and back.

Lord Ellenborough:

"The captain was captain for the voyage originally
"agreed upon and on which the vessel sailed from Eng-
"land. *Everything out of that voyage was beyond the*
"*scope of his authority as captain.* As such, he had no
"power to change that voyage for another."

"The person who is intrusted with the command of a
"ship may be vested with a complete control as to her
"employment and destination; but this is superinduced
"upon his authority as captain; and to show that the cap-
"tain in this case could do away with the contract entered
"into by the owner and conclude a fresh contract binding
"on both parties, you must go farther than merely showing
"that he was captain of the ship."

Wiggins *v.* **Johnson** (1845), 14 M. & W., 609. Charter contains clause "that master of vessel and agents at Bombay "are at liberty to make such alterations in this charter-party as "they may mutually think proper."

What need of such a clause if the power existed already?

Sickens *v.* Irving (1859), 7 Com. B. (N. S.), 165.

Williams, *J.* (171):

"Now there can be no doubt that an agent appointed to "load a cargo at a foreign port has authority to do all acts "that are necessary for the performance of the contract; "and also to vary the mode of performance if any exigency "arises, provided the contract be substantially performed.

"But there is no ground for contending that he has by "law any implied authority to substitute a new contract, "to substitute one sort of commodity for another, sugar "for salt, for instance, or to appoint a different place of "loading from that contemplated by the charter-party. It "is quite new to me to hear it suggested that he has such "anthority, and I cannot but think **it would be very "mischievous** if the agent's authority could be so ex- "tended as thus to vary the contract of his principal."

Byles, *J.* (173):

"It was contended that the agent necessarily had an "implied authority to deviate from the strict letter of the "charter-party, or, in other words, that they had an "implied authority to direct the loading of a different "article in a distant port. It seems to me, however, that "the agents had no such authority in point of law."

Earl, *C. J.*:

"I think this decision is one of very considerable import- "ance, for, if Mr. Wilde had succeeded in his argument, it "might have thrown doubt upon the well known and to "the mercantile world, most **important** rule, that an "agent must be strictly limited by his authority."

Lastly. The propriety of disposing of the defences on exception is settled.

In The H. S. Pickands, 42 F. R., 239, Mr. Justice Brown, when District Judge, refused costs to a claimant because he had not excepted to the libel which was bad on its face.

April 30, 1895.

Respectfully submitted,

GEO. A. BLACK,

Proc. for Liblts.

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

WILLIAM BURRILL *et al.*,
Libellants and Appellants,

vs.

GEORGE W. CROSSMAN *et al.*,
Respondents and Appellees.

BRIEF FOR LIBELLANTS AND APPELLANTS.

Statement.

This cause comes on for hearing before this Court under the following circumstances:

The original libel was filed in the District Court for the Southern District of New York by the libellants, owners of the bark *Kate Burrill*, to recover from the respondents fifty three days demurrage, under a written charter-party of said vessel entered into between the libellants and respondents on March 7, 1893.

To the answer filed by the respondents the libellants filed exceptions, which were overruled by the District Judge, and an application by the libellants to withdraw said exceptions and to amend their libel having been denied, a final decree was entered in the District Court on the 16th day of January,

1895, dismissing the libel with costs (Apostles, p. 57.)

The libellants thereupon appealed to this Court from said decree, and assigned as errors, (1) the overruling of the exceptions to said answer; (2) the denial of the motion to withdraw said exceptions and amend the libel; and (3) to the dismissal of the libel (Apostles, p. 59.)

The libellants then applied to this Court for leave to amend their libel in the manner moved for in the District Court, which application was granted and an order of this Court was duly made and entered on the 18th day of March, 1895, ordering that the libellants have leave to amend their libel as moved for, that such amendments be made within ten days from the date of said order, that the respondents answer said libel and that the parties have leave to except or take evidence as they might be advised. (Order. New Proofs on Appeal, p. 9.)

On March 25, 1895, the libellants filed their amended libel in this Court. (New Proofs on Appeal, p. 11.)

On April 4, 1895, the respondents filed their answer to said amended libel. (New Proofs on Appeal, p. 16.)

On April 8th, the libellants filed exceptions to said answer. (New Proofs on Appeal, p. 23.)

The exceptions to said answer were duly brought on for hearing before this Court, and on November 11, 1895, this Court made its order declining to consider the first exception to the answer, sustaining the second and third of the exceptions, and overruling the fourth exception.

Thereupon, in pursuance of the order of this Court of March 18, 1895, the parties have proceeded to take testimony upon the issues undisposed of, and the cause now comes on for final hearing upon the amended pleadings and upon the evidence of the following witnesses:

GEORGE W. CROSSMAN, examined on behalf of the respondents in the District Court.

Thomas Wilson and William Burrill, examined on behalf of the libellants in this Court.

Edwin E. Hime, examined on behalf of the respondents, under commision to Rio de Janeiro, in this Court.

The Issues.

The amended libel alleges:

1. The ownership by the libellants of the Bark *Kate Burrill.*

Denied by the Answer.

2. The copartnership of the respondents.

Admitted by the Answer.

3. The making of the charter-party on March 7, 1893, whereby the *Kate Burrill* was chartered by the respondents for a voyage from Pensacola to Rio de Janeiro for a full cargo of pitch pine lumber, and that by said charter it was agreed as follows:

"Cargo to be furnished at port of loading at "the average rate of not less than twenty "thousand superficial feet per running day, "Sundays excepted, and to be discharged at "port of destination, at the average rate of not "less than twenty thousand superficial feet per "running day, Sundays excepted, lay days to "commence from the time the vessel is ready "to receive or discharge her cargo, and written "notice thereof is given to the party of the "second part (*i. e.*, William H. Crossman & "Brother), or agent, and for each and every "day's detention by default of the said party "of the second part (*i. e.*, William H. Cross-"man & Brother), or agent, fifty-nine dollars

"and forty-six cents, U. S. gold, or its equiva-
"lent, per day, day by day, shall be paid by
"the said party of the second part (*i.e.*, W.H.
"Crossman & Brother), or agent, to the said
"party of the first part, or agent."

Admitted by the answer, to which a copy of the charter-party is annexed.

4. That the respondents loaded the vessel at Pensacola with a cargo of 534,195 superficial feet of pitch pine lumber of which 67,333 feet were on deck, and sailed for Rio de Janeiro, where she arrived on August 30, 1893; that on the voyage 19,939 feet of deck cargo were lost by perils of the sea, and the balance, amounting to 514,256 feet, delivered at Rio de Janeiro.

Admitted by the Answer.

5. That on September 4, 1893 notice in writing that the vessel was ready to discharge her cargo, was given by the Master to the Companhia Industrial do Brazil, the agent of the respondents at Rio, who receive the cargo but who did not discharge the same at the average rate of not less than 20,000 superficial feet per running day, Sundays excepted, and did not complete the discharge within the twenty-six days, Sundays excepted, allowed for the discharge by the charter, and the demurrage therefor, at the charter rate of $59.46 per day, amounted to $3,151.38, payment of which had been demanded of respondents and refused.

Denied by the Answer, except as to the demand of payment and refusal.

7. That the charter provided: "Vessel to discharge at safe anchorage ground in Rio Bay, designated by charterers."

Admitted by the Answer.

8. That at the time of giving notice of readiness to discharge on September 4, 1893, the vessel was in

fact ready to discharge upon charterers designating a safe anchorage.

Denied by the Answer

9. That charterers did designate an anchorage, and on September 5, 1893, the vessel hauled to such designated anchorage.

Denied by the Answer.

10. That having hauled to the anchorage designated by charterers, the vessel on September 6th commenced the discharge of her cargo, which portion was received by the charterers, the vessel lying at such designated anchorage.

Denied by the Answer.

11. The several dates on which the vessel continued the discharge of her cargo and on which discharge of cargo was suspended by charterers between September 6, 1893, and November 28, 1893, when the discharge was completed, and that during all of the times at which the discharge was suspended the vessel was ready and willing to discharge cargo.

Denied by the Answer.

12. That the total freight on the cargo amounted at charter rates to £1,390–6–5. That the Companhia Industrial do Brazil in November, 1893, made up an account of the freight due at charter rates, amounting to $6,729.17, converted same into sterling at $4.84 per £, amounting to £1,390–6–5, credited itself with £875 paid on account, leaving as a balance due for freight £515–6–5, which sum it paid on or about December 7, 1893, to Phipps Bros. & Co., to which firm it had previously paid the £875 on account. That there was no other account or payment made for freight and no amount paid for demurrage, and that no account of demurrage was ever stated between the Master or Phipps Bros. & Co., and the agents of the respondents, and that

the said sum of £515-6-5 was received in full for freight and for no other purpose.

That on December 12, 1893, the Master made protest before the British Consul against the detention of the vessel for 53 days' demurrage beyond the lay days, claiming $3,151.38, as per charter.

The Answer denies that the payment of £515-6-5 was solely in discharge of freight and avers that it was accepted in full satisfaction of all claims under the charter-party.

Denies knowledge as to the protest made by Master.

13. That neither the Master nor Phipps Bros. & Co. acquiesced in the delay, nor accepted the payment of £515-6-5 in satisfaction of all claims under the charter-party.

Denied by the Answer.

14. That neither the Master nor Phipps Bros. & Co., had authority to enter into any accord and satisfaction with charterers, nor to accept the payment made for any other purpose than as payment of freight due under charter.

Denied by the Answer.

In addition to the denials of the allegations of the libel above set forth, the respondents by their answer, plead in defense as follows:

a. By the Fourteenth Article of the Answer they plead in defense the cesser clause of the charter-party which is annexed to the Answer, as is also the bill of lading. Libellants excepted to this article of the Answer on the ground that it is insufficient in law to constitute a defense, and such exception has been sustained by this Court.

b. By the Fifteenth Article of the Answer, they plead in defence that the discharge of the cargo was prevented by reason of the "acts of the public enemy," viz: "certain vessels of war which were

"then in the Harbor of Rio Janeiro, and were "engaged in firing upon the forts in said harbor; and making war upon the government of Brazil." This defense was also excepted to as insufficient in law and the exception sustained by this Court.

c. By the Sixteenth Article of the Answer they plead an accord and satisfaction, viz:, that an account was stated between the libellants' agents and the consignee respecting all claims under the charter party and that the agents of libellants accepted and received from the consignees the sum £515-6-5 in full settlement of all claims.

This defense was also excepted to as insufficient in law, and said exception overruled.

The questions presented for decision to this Court, therefore, on this final hearing are—

(1) Whether the allegations of the libel controverted by the answer are established by the evidence.

(2) Whether the acceptance by the libellants' agents at Rio of the £515-6-5 was in settlement of all claims under the charter-party, including demurrage.

POINTS.

I.

The allegations of fact contained in the libel are fully established by the evidence.

The amended libel, in addition to the matters of fact necessary to establish a cause of action against the respondents, contains certain anticipatory allegations, bearing upon the defense of accord and satisfaction, or account stated, which had already

been interposed in the answer to the original libel (Articles XI, XII and XIII Amended Libel). These will be considered later in discussing said defense.

The testimony of the libellants' witnesses, Wilson and Burrill and of the respondents' witness, Hime, examined in this Court, fully establish the facts as alleged in the libel.

First Article of Libel:

The ownership of the *Kate Burrill* is proved by the testimony of Mr. Burrill (fol. 163, New Proofs on Appeal).

The matters alleged in the Second, Third and Fourth Articles are admitted.

Fifth Article of Libel:

The fact that the Master of the vessel gave notice in writing to the consignees on September 4, 1893, of the readiness of the vessel to discharge, the effect of which was, by the terms of the charter-party, to start the lay days running (Apostles, fol. 25), is proven by the testimony of Captain Wilson (fol. 137, New Proofs on Appeal).

Respondents' witness Hime testified that the *Kate Burrill* went alongside the wharf at the saw-mill of the parties to whom consignees sold the cargo, on September 4, 1893. (Answer to Fifth Interrogatory, fol. 96, New Proofs on Appeal. Answer to Fourth Cross-Interrogatory, fol. 118, *id.*)

The discharge of the cargo was not completed until November 28, 1893.

Wilson, fol. 145, New Proofs. Log, fol. 209, *id.*

Hime says November 20th (fols. 94–118).

The Sixth Article of the Libel is admitted.

Seventh Article:

At the time of giving notice on September 4, 1893, the vessel was in fact ready to discharge upon charterers' designating a safe anchorage.

Wilson, fols. 141–142, New Proofs. Hime, fols. 96–118, *id.*

Eighth Article:

The consignees did designate an anchorage, and the vessel hauled to said anchorage on September 5th.

Wilson, New Proofs, 137–138. Log, 173, *id.* Hime, fols. 96–118, *id.*

Ninth Article:

The discharge of the cargo was commenced on September 6, at the designated anchorage.

Wilson, fol. 138, New Proofs. Log, fol. 174, *id.*

Hime says on September 4 (fols. 96–118).

Tenth Article:

The particulars and dates of the discharge of the cargo, as alleged in the libel, are shown by the testimony of Captain Wilson and by the log of the vessel, produced by him and received in evidence without objection. The Log and testimony show the amount of cargo discharged and received by the purchasers each day to have been as follows:

September	6th,	150	pieces.
"	9th,	155	"
"	11th,	105	"
"	12th,	105	"
"	13th,	115	" completing deck load.
"	15th,	142	"
"	16th,	173	"
"	18th,	265	"
"	19th,	262	"
"	20th,	117	"
"	21st,	160	"
"	22d,	239	"
"	23d,	226	"
"	25th,	127	"
"	26th,	380	"
"	27th,	257	"
"	28th,	345	"
"	29th,	499	"
"	30th,	360	"

Up to this time the discharge of the cargo had been proceeded with continuously.

It was then discontinued until October 16th.

October	16th,	434 pieces.
"	17th,	163 "
"	23d,	136 "
"	25th,	413 "
"	27th,	356 "
November	6th,	538 "
"	16th,	296 "
"	17th,	621 "
"	20th,	451 "
"	24th,	337 "
"	28th,	435 "

The cargo delivered at Rio contained 514,256 superficial feet (Art. IV Libel, Art. IV Answer) and at the rate of discharge stipulated in the charter, viz.: "at the average rate of not less than twenty thousand superficial feet per running day, Sundays excepted," should have been discharged within 26 days, excluding Sundays, from the date of giving notice of readiness on September 4th. Excluding the four Sundays (Sept. 10th, 17th, 24th and October 1st) the lay days therefore expired October 6th, after which date "$59.46 per day, day by day" became due under the charter. The vessel was detained until November 28th, a further period of 53 days, for which period the libellants claim demurrage at the rate of $59.46 per day, amounting to $3,151.38.

The testimony of the witness Hime that the discharge of the cargo was completed on November 20th (fols. 94–118, New Proofs) is not sufficient to outweigh the testimony of Captain Wilson that the discharge was completed on the 28th (fol. 145) corroborated by the entries in the Log of the vessel, showing the discharge of cargo on November 24th and 28th (fols. 208–209) and the Captain's protest before the Consul (fol. 212).

The cargo was not received by the Company with

which Hime was connected, but by its vendees (fol. 119) and he admits his inability to testify as to the dates on which cargo was discharged (fols. 119–120).

The testimony of Captain Wilson is further corroborated by the letter written by Phipps Bros & Co. to the libellants on November 17th, in which they state: "We saw Captain Wilson a day or two "ago when he told us he had still about 2,000 pcs. "on board and waiting for his consignees to take "them away."

By the Log it appears that on November 16th, 17th, 20th, 24th and 28th, 2,140 pieces were discharged.

That the detention of the vessel was in no manner due to any unreadiness or fault on the part of the vessel or her Master is clearly established.

No fault on the part of the Master or vessel is alleged by the respondents, but on the contrary, the answer alleges (Article 14) that the delay was by reason of the act of the public enemy.

Hime testifies that the delay was due to prohibitory orders on the part of the government (fol. 97, New Proofs).

Captain Wilson testifies that at no time during the month of September while cargo was being discharged daily, did the consignees receive the cargo as fast as the vessel was prepared to discharge it, and that he objected to the slowness of the discharge and was told that as soon as another vessel there was out of the way, his cargo would be taken as fast as he could discharge it (fol. 142, New Proofs). That at no time that month was the cargo taken as fast as at the rate of 20,000 feet per day (143). That after the 30th of September the discharge was suspended because the consignees hadn't warehouse room, and upon his complaining was told that there was no room to put the lumber away on account of the Revolution, that they weren't selling their lumber (143). That during all of the time he kept his crew ready to discharge the cargo and hired extra men to take the places of any who were sick (151).

II.

The defence of an account stated and satisfaction of all claims under the Charter Party is not established.

The claim of the respondents is that the payment of £515 6s 5d made by the consignees to Phipps Bros. & Co. was received and accepted by the latter in full satisfaction of all claims under the charter party.

In considering this claim, certain facts which were fully considered and passed upon by this Court upon the determination of the sufficiency of the exceptions filed to the answer, may be referred to and restated.

By the charter-party it was provided: "The bills "of lading to be signed as presented without preju- "dice to this charter." The bill of lading actually presented by the respondents as charterers, and signed by the Master, provided for "paying freight "for said lumber as per charter-party dated 7th "March, 1893, and average accustomed." The terms of the charter-p[illegible]as to *demurrage* were not incorporated or referred to in the bill of lading, and therefore the endorsee of the bill of lading was not bound by the stipulations of the charter as to demurrage, and he was obliged only to receive the cargo within a reasonable time according to the customs of the port of discharge under the conditions then existing. In other words, the only claim for demurrage *against the cargo or its consignees* was for delay occasioned by the latter's fault.

(Opinion of this Court, fols. 45-49, New proofs).

Captain Wilson testifies that when the lay days expired, he called on the consignees and stated that he intended to claim demurrage, and was told that couldn't claim any demurrage on account of the Revolution (fols. 148-157-158). Hime admits that the Captain called on him about the delay in dis-

charging the cargo and that he told him he had to obey the Government's orders and that he (Hime) had nothing to do with it (97–99). How, therefore, can it be contended that the payment of £515 6s 5d, made by the consignees, was in discharge of a liability which they insist did not exist? Under the terms of the bill of lading, the master had no right to claim as against the consignees demurrage for delay occasioned by the existing Revolution, and his claim for same was met by a refusal to pay based upon that express ground. What was then left for him to do but to enter his protest officially before the consul and reserve his owner's rights?

It should be noted that no account or statement of the demurrage claimed was presented by the Master or by Phipps Bros. & Co. to the consignees, and that the only statement rendered was the one prepared by the consignees and rendered to Phipps Bros. & Co., accompanying the payment of the £515 6s 5d. That statement has been offered in evidence (page 51, New Proofs) and identified by the witness Hime, and it shows that the payment of the £515 6s 5d was for the exact amount of the freight as per charter-party and bill of lading, less the amount of a prior payment on account and the disbursements and commissions of the consignee, stating the details of the computation.

There is absolutely no evidence in the record to support the contention that the payment made was in full satisfaction of all claims under the charter-party.

Hime, indeed, does testify that when he settled with Phipps Bros. & Co. he "was certainly under the impression that when they received the balance due the vessel * * * it was in settlement of all amounts due to the vessel in conformity with the charter-party" (fols. 103–104).

His "impression" undoubtedly was based upon his opinion that no claim for demurrage against *anyone* existed under the circumstances, as he takes pains to state in another part of his answer to the

same interrogatory, and in support of which he cites the cases of three other vessels where no demurrage was claimed. It is apparent from an inspection of the account rendered that, whatever might have been the "impression" of Mr. Hime, the account was one of the indebtedness for *freight only*.

III.

There is no proof of the authority of either the master or Phipps Bros. & Co. to waive the claim for demurrage, or to enter into any accord and satisfaction with the charterers or to receive the sum paid for any other purpose than in payment of freight.

This was the ground of the Fourth Exception filed by the libellants to the answer.

This Court held that the denial by the respondents of the allegation of want of authority contained in the libel was equivalent to an affirmative allegation of authority, and stated as follows:

> "Upon the question whether there was an "accord and satisfaction made by those hav- "ing authority to represent the libellants there- "for, is a question of fact to be determined "upon a view of all the incidents of the trans- "action when the proofs are all before the "Court." (Opinion, fols. 59–60.)

If purporting to act under a power of attorney, it is obvious that the powers of the special agent would be restricted to the four corners of the paper.

Dunlap's Paley's Agency, p. 201.

Does it make any difference that the paper is called a charter-party? If the agent can com-

promise demurrage, he can compromise freight and accept one-half the rate provided, or he can enlarge the number of lay days, and thus reduce the demurrage or decrease the stipulated rates of demurrage, and reach the same result. The charterers had the charter and that told them what their contract obligations were, and that they were dealing with an agent whose *duty was expressed in the paper*, viz., collect the agreed freight and demurrage.

Dunlap's Paley's Agency, p. 201: "Nor can an "agent without express authority compound a "debt."

Abbott on Shipping (12 Eng. ed.), p. 89:

"But if the owners themselves have made a "*special contract* for the employment of their "ship, the master cannot, by the general and "implied authority of his character as master "only, annul such a contract and substitute "another for it, with the other contracting "party."

In other words, by this charter, the shipper had 26 days (by computation) to discharge in. The master could not give him 30, nor change the rate of $59.46 fixed by the charter for each day's demurrage, and if he could not do so directly, he certainly could not do so indirectly by an "accord and satis-"faction."

Even an attorney-at-law has no power to compromise.

Holker *v.* Parker, 7 Cranch, 436.

Burgon *v.* Sharpe, 2 Campbell, 529. Action for freight and demurrage, on a memorandum for a charter; voyage from London to Buenos Ayres and back.

Lord Ellenborough:

"The captain was captain for the voyage "originally agreed upon, and on which the "vessel sailed from England. *Everything out*

" *of that voyage was beyond the scope of his* " *authority as captain.* As such he had no " power to change that voyage for another."

" The person who is intrusted with the com- " mand of a ship may be vested with a complete " control as to her employment and destina- " tion; but this is superinduced upon his " authority as captain; and to show that the " captain in this case could do away with the " contract entered into by the owner and con- " clude a fresh contract binding on both par- " ties, you must go further than merely show- " ing that he was captain of the ship."

Sickens *v.* Irving (1859), 7 Com. B., 165.

Williams, *J.* (171):

" Now there can be no doubt that an agent " appointed to load a cargo at a foreign port " has authority to do all acts that are necessary " for the performance of the contract; and " also to vary the mode of performance if " any exigency arises, provided the contract " be substantially performed.

" But there is no ground for contending that " he has by law any implied authority to sub- " stitute a new contract, to substitute one sort " of commodity for another, sugar for salt for " instance, or to appoint a different place of " loading from that contemplated by the char- " ter party. It is quite new to me to hear it " suggested that he has such authority, and I " cannot but think IT WOULD BE VERY MIS- " CHIEVOUS if the agent's authority could be " so extended as thus to vary the contract of " his principal."

Byles, *J.* (173):

" It was contended that the agent necessarily " had an implied authority to deviate from the " strict letter of the charter-party, or, in other

"words, that they had an implied authority to "direct the loading of a different article in a "distant port. It seems to me, however, that "the agents had no such authority in point of "law."

Earl, *C. J.*:

"I think this decision is one of very consid- "erable importance, for, if Mr. Wilde had suc- "ceeded in his argument, it might have thrown "doubt upon the well known and to the mer- "cantile world, most IMPORTANT rule, that an "agent must be strictly limited by his author- "ity."

The only evidence bearing upon the question of the authority of Phipps Bros. & Co. is that of the witness Hime, who testified that the Companhia Industrial do Brazil received a letter from Phipps Bros. & Co. in which the latter stated that they were the attorneys for the owners of the vessel, instructed the company not to give the captain any money but to liquidate the accounts of the vessel with them. The letter itself was not produced, the witness stating his recollection of its contents (fol. 94-95, New Proofs).

This testimony is clearly insufficient to sustain a contention that Phipps Bros. & Co. had authority to waive or compromise the libellants' right to demurrage under the charter-party.

IV

The libellants are entitled to recover interest on the amount due.

Milburn *v.* 35,000 boxes of oranges, 57 F. R., 236.

LASTLY—The decree of the District Court should be reversed, and the cause remanded to that Court

with directions to decree in favor of the libellants for $3,151.38 with interest from November 28, 1893, with costs of the District Court and of this Court.

BLACK & KNEELAND,
Proctors for Libellants.

LAWRENCE KNEELAND,
Advocate.